

ORIGINAL

Docket No. 96-1395

Supreme Court, U.S.

FILED

JUN 6 1997

CLERK

(10)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JAMES B. KING, DIRECTOR, OFFICE OF
PERSONNEL MANAGEMENT,

Petitioner,

-VS-

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF
PERSONNEL MANAGEMENT,

Petitioner,

-VS-

HARRY R. McMANUS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RESPONDENT JEANETTE M. WALSH'S REQUEST TO
PROCEED IN FORMA PAUPERIS

JOHN R. KOCH

Counsel for Respondent Jeanette M. Walsh
REICHERT, WENNER, KOCH & PROVINZINO, P.A.
501 St. Germain
P.O. Box 1556
St. Cloud, MN 56302
(320) 252-7600

18 P/1

Respondent Walsh by and through her counsel, John R. Koch, requests to proceed
in forma pauperis. As grounds for this request, respondent Walsh states as follows:

1. Respondent Walsh has been directed by the Clerk of the United States Supreme Court to file a response to Petitioner's Petition for Writ of Certiorari.

2. Respondent has been advised that the cost of printing a response will be in the neighborhood of \$1,000, and that any future briefing request will be even more expensive.

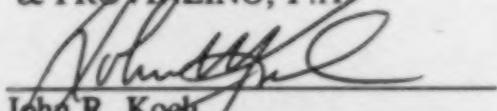
3. Respondent has prepared and files herewith a copy of her notarized Affidavit in the form prescribed by the Federal Rules of Appellate Proceeding set forth her financial circumstances.

4. Respondent has not sought or been granted leave to proceed *in forma pauperis* in any other court.

WHEREFORE, respondent requests an order of the court that she be granted leave to proceed *in forma pauperis*.

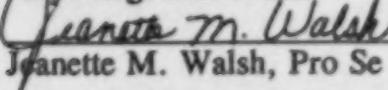
Respectfully submitted this 5 day of June, 1997.

REICHERT, WENNER, KOCH
& PROVINZINO, P.A.


John R. Koch

Attorney for Respondent Walsh
501 St. Germain
P.O. Box 1556
St. Cloud, MN 56302
(320) 252-7600

Atty. Reg. No. 57228


Jeanette M. Walsh, Pro Se

Docket No. 96-1395

IN THE
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OCTOBER TERM, 1996

JAMES B. KING, DIRECTOR, OFFICE OF
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Petitioner,

-vs-

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF
PERSONNEL MANAGEMENT,

Petitioner,

-vs-

HARRY R. MCMANUS, ET AL.

AFFIDAVIT IN FORMA PAUPERIS

STATE OF MINNESOTA)

)ss.

COUNTY OF STEARNS)

I, Jeanette Walsh, being first duly sworn, depose and say that I am one of the respondents in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security

therefore; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following: to file a brief in response to the director of the Office of Personnel Management's Petition for a Writ of Certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you employed?
 - a. Department of Veteran's Affairs, net income of \$1,529 per month.
 - b. Not applicable.
2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?
 - a. No.
3. Do you own any cash or checking or savings accounts?
 - a. Yes, three. A checking account with approximately \$100.
4. Do you have any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
 - a. I own a home worth approximately \$60,000 with an outstanding mortgage of \$40,000. I do not own a car or any stocks, bonds, notes or other valuable property.
5. List the persons who are dependant upon you for support and state your relationship to those persons.
 - a. No dependents.

I understand that a false statement or answer to any question in this affidavit will subject me to the penalties for perjury.

Jeanette Walsh
Jeanette Walsh

Subscribed and sworn to before me
this 5th day of June, 1997.

Patty J. Hanson
Notary Public

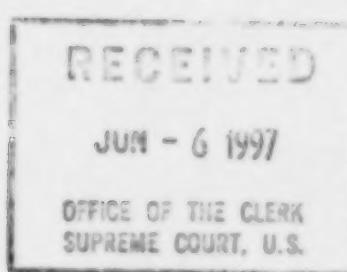


Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor and by filing briefs in accordance with Rule 33.2.

REICHERT, WENNER, KOCH & PROVINZINO
PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

THOMAS R. WENNER
JOHN R. KOCH
JOHN C. PROVINZINO
ROBERT H. WENNER
EDWARD M. REICHERT, JR. (RETIRED)

June 5, 1997



William K. Suter
The Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Re: James B. King, Office of Personnel Management
-vs- Lester E. Erickson, et al
No. 96-1395

Dear Mr. Suter:

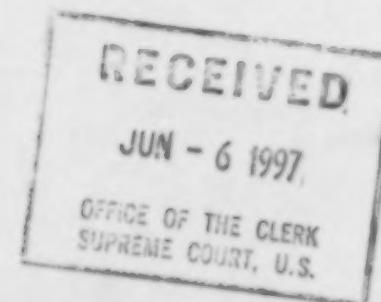
Enclosed please find Respondent Jeanette M. Walsh's Request to Proceed In Forma Pauperis, Affidavit to Proceed In Forma Pauperis and Respondent Walsh's Brief in Opposition regarding the above matter.

Very truly yours,

REICHERT, WENNER, KOCH
& PROVINZINO

John R. Koch
John R. Koch

JRK:kf
Enc.



501 ST. GERMAIN
P.O. BOX 1556
ST. CLOUD, MINNESOTA 56302
TELEPHONE - AREA CODE 320
252-7600 252-7601 252-7602
FAX: 320-252-2678

BRANCH OFFICE:
RICHMOND, MN 56348
507-3599

REPLY TO:
BOX 1556 - ST. CLOUD, MN
56302

Sent Via Overnight Mail

STATE OF MINNESOTA)
COUNTY OF STEARNS)ss.
)

AFFIDAVIT OF SERVICE

Kristi L. Finken, of the City of Albany, County of Stearns, State of Minnesota, being duly sworn, says that on the 5th day of June, 1997, she served the annexed Respondent Jeanette M. Walsh's Request to Proceed In Forma Pauperis and Respondent Walsh's Brief in Opposition on the followin in this action:

Lorraine Lewis, Esq.
Office of General Counsel
Office of Personnel Management
Washington, DC 20415

Hannah B. Best
Counsel for Respondent Barrett and Roberts
1003 Luna Circle NW
Albuquerque, NM 87102

Mary Jennings
Deputy General Counsel
General Counsel Office
Merit Systems Protection Board
1120 Vermont Avenue, NW
Washington, DC 20419

Walter Dellinger, Esq.
Acting Solicitor General
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvanian Avenue, NW
Washington, DC 20530-0001
(Sent via overnight mail)

Neil C. Bonney, Esq.
Counsel for Respondent Kye
Neil Bonney & Associates, P.C.
4652-A Haygood Road
Virginia Beach, VA 23455

Paul E. Marth
Counsel for Respondent Erickson
Forman, Marth, Black & Angle, P.A.
235 North Green Street
P.O. Box 2020
Greensboro, NC 27402-2020

by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at St. Cloud, Minnesota directed to said party at the last known address of said party.

Kristi L. Finken
Kristi L. Finken

Subscribed and sworn to before me
this 5th day of June, 1997.

Renita E. Rohloff
Renita E. Rohloff
Notary Public



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-vs-

HARRY R. MCMANUS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RESPONDENT WALSH'S BRIEF IN OPPOSITION

Jeanette Walsh Pro Se
John R. Koch - #57228
Counsel for Respondent Jeanette Walsh
REICHERT, WENNER, KOCH
& PROVINZINO, P.A.
501 St. Germain
P.O. Box 1556
St. Cloud, MN 56302
(320) 252-7600

QUESTION PRESENTED

Whether the Due Process Clause precludes a federal agency from sanctioning an employee for making false statements when the employee denies engaging in employment-related misconduct.

STATEMENT REQUIRED BY RULE 29.6

The Petitioner has correctly listed the parties to the proceeding. There is no corporation which is a party to this proceeding.

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In the
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October Term, 1996

JAMES B. KING, DIRECTOR, OFFICE OF
PERSONNEL MANAGEMENT, PETITIONER

-vs-

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF
PERSONNEL MANAGEMENT, PETITIONER

-vs-

HARRY R. McMANUS, ET AL.

*ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

RESPONDENT WALSH'S BRIEF IN OPPOSITION

Pursuant to Rule 15 of the Court's rules, Respondent Jeanette Walsh respectfully files this brief in opposition to the Office of Personnel Management's Petition for Writ of Certiorari.

**OPINIONS BELOW AND
NOTICE THAT JURISDICTION OF THIS COURT IS
CORRECTLY PRESENTED BY PETITIONER**

The decision of the United States Court of Appeals for the Federal Circuit is reported as *King v. Erickson*, 89 F3d 1575 (Fed. Cir. 1996). App., 1a-23a. The decision of the Merit Systems Protection Board is *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994). App., 29A-49A. Jurisdiction is correctly presented by petitioner.

STATEMENT OF THE CASE

The Department of Veteran Affairs employed respondent Jeanette Walsh as a Social Services Assistant at the agency medical center in St. Cloud, Minnesota. The agency removed her for engaging in a sexual relationship with a patient, engaging in improper financial dealings, and providing false statements to the agency regarding her relationship with the patient. Walsh challenged the dismissal and an administrative judge found that the agency had failed to prove any of the charges. In this decision, the administrative judge premised his findings on prior inconsistent statements made by the patient.

The agency petitioned the Merit Systems Protection Board for review. The MSPB reversed the administrative judge's finding that the agency had failed to prove a sexual relationship with the patient while he was an inpatient. The MSPB focused on inconsistent statements made by Walsh and relied on the presumption that once a

witness' statement has been discredited, the rest of the statement may be disregarded or discounted unless there is a reasoned explanation. On the falsification issue, the MSPB followed *Grubka v. Department of the Treasury*, 858 F2d 1570 (Fed. Cir. 1988), that an agency may not charge an employee both with misconduct and with making false statements regarding the misconduct. The MSPB interpreted *Grubka* as giving an employee the due process right to be heard on a charge without having falsification automatically sustained whenever the holding on the related misconduct charges are sustained. App., 4a, 40a. The MSPB mitigated Walsh's penalty to a 90-day suspension. App., 42a. The Federal Circuit affirmed the decision. App., 2a.

ARGUMENTS FOR DENYING THE PETITION

Before the government can deprive one of its employees of a protected property interest in employment based on an allegation of misconduct, the employee is entitled to basic rights of due process which include notice and an opportunity to be heard on the charges. 5 U.S.C. § 7513(b) (1994); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). At earlier stages of this proceeding, the government conceded that due process also included the right of the employee to defend against the charges by denying the charges. The government also conceded that an employee, when faced with misconduct charges, may respond with a legal conclusion that she did not commit the misconduct underlying the charges, but it argued that an employee may not deny the misconduct itself without subjecting herself

to a separate charge of falsification. The Federal Circuit rejected this distinction:

A denial of underlying facts is in effect a denial of the charge that they support. Allowing an agency to charge an employee with falsely denying facts underlying a misconduct charge would deprive the employee of a *meaningful* opportunity to respond to the charges.

App., 16a.

The rule that has existed in the federal system for almost a decade is expressed in *Grubka*, 858 F.2d at 1575:

It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and regardless of the outcome, the denial is not itself a separate offense.

The government's brief argues that denials of facts are "affirmative misleading", "falsehoods", "false statements", "right to lie" and so forth. The Federal Circuit answered this question by holding that an employee may not falsify facts or tell "tall tales" or go beyond denial and defense in staking out a position. In this respect, the factual circumstances of *Walsh v. Department of Veterans Affairs* are particularly appropriate. Ms. Walsh was charged with having a sexual relationship with a man while he was an inpatient at the agency's medical center and with falsification for denying the charge. She *admitted* that she had had an intimate relationship with the man *after* his discharge from the center and at later times, but denied that she had had a relationship during the time he was an inpatient. App., 36a-37a. The administrative judge found that the agency had failed to prove the underlying charges,

basing this finding on the charging patient's questionable credibility as determined from several prior inconsistent statements, an alcoholic background, a delay of 2½ years in coming forward, and a potential personal benefit to fabricate the story of an inpatient relationship. In reversing these findings, the MSPB shifted the focus to inconsistent statements made by Walsh and resorted to evidentiary presumptions on credibility. App., 32a. The Federal Circuit was mindful of these concerns, noting that "memories are often faulty" and that "responses to questions may not always be accurate."

To render such statements constituting denials as actionable falsehoods might too readily transfer credibility determinations into separate charges of falsification.

App., 17A.

The government relies heavily on *United States v. Dunnigan*, 507 U.S. 87 (1993), in which this Court held that Sentencing Guideline § 3C1.1, which calls for an enhancement of a defendant's sentence if the defendant commits perjury at trial, does not undermine the constitutional right to testify. Although additional charges for falsification may increase the sanction in the present case, the analogy here is more apparent than real. The constitutional issue in *Dunnigan* was the right to testify, not the due process right to deny charges without fear of additional charges for "false denials" if the matter is decided adversely. In *Dunnigan* there was perjury at the trial, and the matter of the underlying guilt was determined beyond a reasonable doubt.

Id., at 96. Unlike *Walsh* in which there were close credibility questions, in *Dunnigan* it was undisputed that perjury was committed "[g]iven the numerous witnesses who contradicted respondent regarding so many facts on which she could not have been mistaken . . ." *Id.*, at 95-96. Further, the district court made specific findings of an obstruction of justice encompassing all of the factual predicates defining perjury. Significantly, the very language of Sentencing Guideline § 3C1.1 was for willfully impeding or obstructing the administration of justice during the prosecution of the crime. No suggestion was ever made that Walsh's simple denials constituted an obstruction of justice.

Ms. Walsh was asked by Veterans Administration investigators on two occasions whether she had had an improper sexual relationship with a patient of the medical center. These questions were tantamount to charges of major misconduct. Ms. Walsh responded "no" to each of these charges although she admitted that she became sexually intimate with the patient after his discharge from the facility. She did not make up a false story or tell "tall tales." She did not deceive, affirmatively mislead, impede, obstruct or do anything other than preserve her right to a meaningful hearing. In any verbal interchange, there are many shades of meaning.¹ Employees may be uncertain whether conduct constitutes misconduct, yet they may be coerced

¹The MSPB found that Walsh had an intimate relationship with the patient while he was an *outpatient*, and used for proof of the outpatient status that the patient had missed several appointments at the medical center. App., 36a-37a.

into admitting the misconduct, whether they believe they are guilty or not, in order to avoid the more severe penalty of removal resulting from a falsification charge. App, 17a-18a. If employees cannot in effect deny the charge, either because they are not guilty or to force the agency to prove the charge, the effect of the due process right to notice and a right to hearing is considerably diminished.

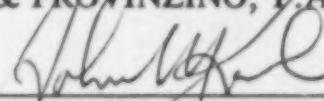
The rule established by *Grubka* for the federal system has been in operation for eight years and has worked adequately. There is no need for Supreme Court review of this question.

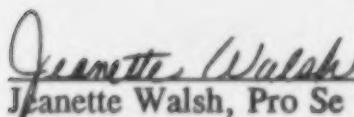
CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

REICHERT, WENNER, KOCH
& PROVINZINO, P.A.


John R. Koch - #57228
Attorney for Respondent Walsh
501 St. Germain
P.O. Box 1556
St. Cloud, MN 56302
(320) 252-7600


Jeanette Walsh, Pro Se